United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7210

IN THE UNITED STATES COURT OF APPEA.
FOR THE SECOND CIRCUIT

B

P/S

EULA LEE BLOWERS, individually and on behalf of all other persons similarly situated,

Plaintiff-Appellant

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Applicant for Intervention-Appellant

-v-

LAWYERS COOPERATIVE PUBLISHING COMPANY, INC., DONALD BENNETT, CHARLES DONNER and ROBERT FEIN

Defendants-Appellees

****

PATRICIA LOUGHNEY and GENESEE VALLEY CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN

Plaintiffs-Appellants

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Applicant for Interven[illegible]
Appellant

-v-

LAWYERS COOPERATIVE PUBLISHING COMPANY, [illegible]C.

Defendant-Appellee

****

MARY NAGEOTTE, VINCENZA LINDA GRICE, PASHA BAKER, PAT PRUSAK, ELLEN MICHELSON, ELIZABETH ARES, MARGARET MOULTON, BEVERLY NEATROUR, VIRGINIA SWEENEY and GENESEE VALLEY CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN

Plaintiffs-Appellants

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Applicant for Intervention-Appellant

-v-

LAWYERS COOPERATIVE PUBLISHING COMPANY, INC.

Defendant-Appellee

****

4

ON APPEAL FROM DECISIONS AND ORDERS OF
THE UNITED STATES DISTRICT COURT OF
THE WESTERN DISTRICT OF NEW YORK

Civil Action Nos. 1973-47, 1973-238, 1973-346

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Emmelyn Logan-Baldwin
Attorney for Plaintiffs-Appellants
510 Powers Building
Rochester, New York 14614

ARGUMENT

I. THE COURT BELOW ERRED IN DENYING THE APPLICATIONS OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION TO INTERVENE SINCE THE APPLICATIONS MEET ALL THE REQUIREMENTS IN LAW

The thrust of defendants-appellees argument to support denial of intervention is to suggest that the Equal Employment Opportunity Commission participation would come at a time when the case has already progressed substantially toward trial. Such is not the case in fact, as both the Equal Employment Opportunity Commission and plaintiffs-appellants outline in their briefs to the court. Motions relating to constituting the lawsuit a class action and resolving questions on discovery have been pending since April, 1973 and are yet undecided.

Contrary to what defendants-appellees suggest in their brief at pages 4 and 17, there has been no pre-trial conference by the court pursuant to Rule 16 of the Federal Rules of Civil Procedure. There has been only one time that counsel for plaintiffs-appellants can recall when there was any contact between counsel for the parties and the court - outside of appearances for argument of various motions before the court. Counsel for plaintiffs-appellants attended a conference with counsel for defendants-appellees and the Judge in July of 1974 after the Judge's secretary had informed her that defendants' counsel had

approached the Judge unilaterally about the cases. Counsel for plaintiffs was informed that the Judge did not wish to discuss the cases in her absence and requested her presence.

At the conference in July of 1974, the Judge asked counsel for defendants to explain to him and to counsel for plaintiffs what he wished to discuss. Counsel for defendants then suggested to the court that these cases involve only a few small claims and that the court ought therefore hold some proceeding whereby it could review one claim for the purposes of assessing damages, using that evaluation of one claim to award damages on all the other claims.

The court inquired whether defendants intended to admit liability. Defendants' counsel suggested that the court would not need reach that question.

Counsel for plaintiffs pointed out that the cases involve complicated claims of class-wide discrimination. No evaluation of one particular claim could fairly be used to resolve all the claims.

The court concluded the conference noting that there was no agreement between the parties to proceeding as suggested. There was no order proposed and/or entered as a consequence of the conference.

There had been no discovery of the defendants prior to the time of the application of the Equal Employment Opportunity Commission to intervene in the Blowers litigation. Some seven

days of deposition of the personnel director of the Laywers Cooperative Publishing Company have been completed since the intervention application and pursuant to the court's order in the Loughney case that the defendants appear for depositions. While defendants have produced some documents, there remain unsupplied to the plaintiffs a number of documents which have been enumerated in the deposition record and in lists supplied to the defendants. Counsel for plaintiffs has requested that those documents be supplied in advance of further testimony of the personnel director in order to expedite the depositions and to economize the time of counsel for both parties. Among the essential documents on which plaintiffs are waiting are the personnel files of the plaintiffs other than Blowers and Loughney. To date, defendants have insisted that those files can only be examined at the company premises.

Plaintiffs have been and are taking advantage of all discovery opportunities. Defendants have "volunteered" some discovery on condition of plaintiffs meeting impossible demands. For example, around the first of September, 1975, defendants "volunteered answers" to the First Interrogatories in the Blowers litigation. Most of the interrogatories were not answered at all. Rather, the defendants are suggesting that plaintiffs prepare their answers to their own interrogatories by examining defendants' records. Defendants also imposed strict limitations

on plaintiffs' use of the information obtained.(A copy of plaintiffs' motion to compel answers to the interrogatories is attached hereto as Appendix A.)

The Equal Employment Opportunity Commission has assured the court below that it joins in the discovery requests of the plaintiffs. It will not seek to duplicate discovery already undertaken, to the limited extent it has been undertaken; it will coordinate future discovery requests with the plaintiffs. Intervention by the Commission will not be a cause for delay in litigating the cases.

Finally, defendants' argument that plaintiffs have no standing to be heard on this intervention question is without merit. The court below could not have considered the application of the Commission to intervene in this lawsuit without the participation of the plaintiffs and without having ascertained plaintiffs' position as to that intervention. Now that the Commission has appealed that denial of intervention, plaintiffs have a right to be heard by this court on their position respecting intervention, just as they were heard by the court below.

For the foregoing reasons and for the reasons previously outlined in plaintiffs-appellants' brief, it is respectfully requested that the court reverse the lower court's denial of intervention in these cases to the Equal Employment

Opportunity Commission and direct that such intervention be granted.

Respectfully submitted,

Emmelyn Logan-Baldwin
Attorney for plaintiffs-appellants
510 Powers Building
Rochester, New York 14614
Telephone: 716/232-2292

November 10, 1975

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Brief of plaintiffs-appellants has been served on the defendants by my causing two copies of the same to be delivered to the offices of attorneys for defendants, Nixon, Hargrave, Devans & Doyle, John B. McCrory, Esquire, of counsel, Lincoln First Tower, Rochester, New York this 10th day of November, 1975 and the same has also been served on the intervenor-applicant, Equal Employment Opportunity Commission by my causing there to be mailed two copies of the same, properly addressed, postage prepaid to attorneys for intervenor-applicant, James Scanlon, Esquire, Equal Employment Opportunity Commission, 2401 E Street, N.W., Washington, D.C. 20506, this 10th day of November, 1975.

Emmelyn Logan-Baldwin
Attorney for Plaintiffs-Appellants
510 Powers Building
Rochester, New York 14614
Telephone: 716/232-2292

November 10, 1975

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

EULA LEE BLOWERS, individually and on behalf of all other persons similarly situated

Plaintiff

-v-

LAWYERS COOPERATIVE PUBLISHING COMPANY, INC., et al

Defendants

PATRICIA LOUGHNEY, et al

Plaintiffs

-v-

LAWYERS COOPERATIVE PUBLISHING COMPANY, INC.

Defendant

MARY NAGEOTTE, et al

Plaintiffs

-v-

LAWYERS COOPERATIVE PUBLISHING COMPANY, INC.

Defendant

NOTICE OF MOTION
AND
MOTION TO COMPEL DISCOVERY

PLEASE TAKE NOTICE that upon the Summons and Complaint, plaintiff's Cross Notice of Deposition, plaintiff's Notice of Motion, dated March 22, 1973, plaintiff's opposing affidavits, dated April 6, 1973, plaintiff's Notice of Motion dated February 11, 1974, plaintiff's Notice of Motion dated April 3, 1974, plaintiff's Notice to Produce dated April 2, 1974, First Interrogatories Propounded by Plaintiff dated April 3, 1974,

plaintiff's attorney affirmation dated April 20, 1974, plaintiff's Notice of Motion to Compel Discovery dated May 7, 1974, plaintiff's attorney Supplemental Affirmation in Support of Motion to Compel Discovery dated May 17, 1974, in the Blowers litigation above-noted, the affirmation of Emmelyn Logan-Baldwin, November 3, 1975, attached hereto, and all the papers and proceedings heretofore had in the above-noted, consolidated actions, plaintiffs will bring a motion, pursuant to Federal Rules of Civil Procedure 37 to compel answers to First Interrogatories Propounded by Plaintiff dated April 3, 1975 and for such other and further relief as to the court may seem just and proper, for hearing before the court at a motion term thereof on November 24 , 1975 at the Federal Building, State Street, Rochester, New York at 10:00 a.m. or as soon thereafter as counsel can be heard. The ground for the motion is that answers volunteered by the defendants and served on or about September 2, 1975 are incomplete, unresponsive and improper.

PLEASE TAKE FURTHER NOTICE that upon these same papers, plaintiffs will renew all previous motions to compel discovery, above-noted.

PLEASE TAKE FURTHER NOTICE that any responsive affirmations, affidavits, briefs and/or memoranda shall be served on plaintiffs' attorney on or before November 19 , 1975.

November 3, 1975

Emmelyn Logan-Baldwin
Attorney for Plaintiffs
510 Powers Building
Rochester, New York 14614
716/232-2292

TO: Nixon, Hargrave, Devans & Doyle
John B. McCrory, Esquire, of Counsel
Lincoln First Tower
Rochester, New York 14604

James Scanlon, Esquire
Equal Employment Opportunity Commission
2401 E Street, N.W.
Washington, D.C. 20506

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

EULA LEE BLOWERS, individually and on behalf of all other persons similarly situated Plaintiff -v- LAWYERS COOPERATIVE PUBLISHING COMPANY, INC., et al Defendants	AFFIRMATION IN SUPPORT OF MOTION TO COMPEL DISCOVERY
PATRICIA LOUGHNEY, et al Plaintiffs -v- LAWYERS COOPERATIVE PUBLISHING COMPANY, INC. Defendant	
MARY NAGEOTTE, et al Plaintiffs -v- LAWYERS COOPERATIVE PUBLISHING COMPANY, INC. Defendant	

Emmelyn Logan-Baldwin, under penalties of perjury, affirms the following:

1. I am an attorney at law duly licensed to practice my profession in the State of New York. I am admitted to the bar of this court. I am the attorney for the plaintiffs in the above-noted consolidated lawsuits. I am familiar with the pleadings and proceedings in the lawsuit. I make this affirmation in support of the motion to compel answers to First Interrogatories Propounded by Plaintiff dated April 3, 1974. This affirmation is submitted

also in support of previous motions to compel discovery, yet undecided by the court and renewed now by the plaintiffs.

2. This motion should be granted because the answers which defendants "volunteered" on or about September 2, 1975 are incomplete, unresponsive and improper. Defendants answers are another in a long series of tactics employed by the defendants to delay, postpone and make difficult and/or impossible legitimate discovery by the plaintiffs. The court should, therefore, not only grant the motion to compel answers to the interrogatories but should grant plaintiffs' previous motions to compel discovery from the defendant.

3. The interrogatories in question were served on the defendants on April 3, 1974. At that same time, plaintiff Blowers moved to shorten the time for the responses. Defendants opposed any shortening of time to answer the interrogatories; they asked instead that the court allow them an undetermined time in the future to answer the interrogatories, pointing out that they would need to review personnel files in responding to the interrogatories, that they would need time to interpret the data to answer the interrogatories and that they anticipated a need to hire personnel to help with the preparation of the answers. (See Answering Affidavit of Donald S. Bennett, April 18, 1974.) Defendants separately moved for an order of protection limiting the time period for which answers should be supplied. (See defendants' Motion for Protective Order, April 17, 1974.)

4. Plaintiff Blowers, on the other hand, by her attorney affirmation of April 20, 1975, noted the ready accessibility of all information requested. For example, the type of information requested in the interrogatories has been made available by the defendants to the Federal Government in connection with

contract compliance obligations, much of the information can be retrieved from computer banks and the defendants recently undertook their own analysis of each job position, classification or description in the company.

5. The court took plaintiff Blowers' motions to compel responses to the interrogatories and defendants' motion for protective order under advisement. The court still has these motions under advisement.

6. On September 2, 1975, defendants "volunteered" what they suggest are answers to the interrogatories. While the defendants have told the court in the motions presently pending before the court for decision that they will answer the interrogatories as posed, but for a more limited time period, the defendants in their "answers" now take the position that no answers will be supplied for most of the questions. Incomplete or improper answers are proffered for the remaining questions.

7. While the defendants in the motions presently awaiting this court's decision indicate that they are undertaking a survey of their company records to answer the interrogatories, defendants now reveal that they have not undertaken any such examination of their records. Rather, the defendants suggest that plaintiffs must find the answers for all or a portion of twenty-five of the interrogatories by plaintiffs examining company personnel records. (See responses to interrogatories 3, 4, 6, 7, 15, 16, 17, 18, 23, 24, 26, 27, 28, 29, 31, 33, 39, 42, 45, 48, 49, 54, 55, 58 and 59.) Eleven other interrogatories are ignored by the defendants, apparently, assuming that plaintiffs will find the responses by examination of company personnel files. (See answers to interrogatories 30, 32, 34, 38, 40, 44, 47, 56, 62, 65 and 66.)

8. While not even attempting, therefore, to answer thirty-six out of the total of sixty-six interrogatories, defendants effectively assure that the questions will never be answered by imposing virtually impossible conditions on the plaintiffs obtaining the information on their own initiative and so conditioning plaintiffs' use of that information, if obtained, so that the plaintiffs are effectively limited from using the information in evidence. (I attach hereto as Exhibit A the detailed conditions which defendants seek to impose.)

9. The defendants improperly asset the applicability of Federal Rule of Civil Procedure 33 in these circumstances. It is appropriate to refer an inquiring party to materials for the inquiring party to obtain answers only when the burden in ascertaining the answer is substantially the same for both parties. The defendants are asserting that plaintiffs can as effectively ascertain answers from personnel records which they have never had access to and have never seen as defendants can obtain those answers from the records which defendants have compiled and have had in their continual control.

10. Defendants are unquestionably in a better position to obtain information from their own personnel records than the plaintiffs; there is no comparison of the respective burden between the parties. Not only are the defendants more familiar with their own personnel records but the defendants have had constant need to pointedly refer to their personnel records since plaintiffs first initiated the complaints of employment discrimination in December of 1971. For example, following complaint by some of these plaintiffs to the Office of Federal Contract Compliance of illegal employment practices by these defendants, the Federal Government undertook a compliance review of Lawyers Cooperative Publishing Company. The charges of the

plaintiffs were confirmed by the Federal Government, which on examining the personnel records of the company, found women employees excluded from employment in a number of departments in the company and the company using classifications and pay scales which discriminate against women employees. All this data was reviewed very comprehensively with company officials with the Federal Government issuing a letter to show cause to the company when it failed to undertake appropriate corrective action.

11. The defendants know very well the answers to the interrogatories. In fact, employment information for at least the last five years is easily retrieved by the company from its computer. In fact, Lawyers Cooperative Publishing Company has produced employment information in the form of computer printouts when pressed both in prior proceedings before this court and in proceedings before the Monroe County Supreme Court.

12. What the defendants hope to avoid in refusing to answer the interrogatories here is to avoid making statements under oath about their employment practices, which statements, properly phrased as answers to interrogatories may be used in evidence.

13. Plaintiffs are, of course, entitled to identification of the documents from which defendants answer particular interrogatories. Throughout the interrogatories, plaintiffs have requested that such identification be made. Plaintiffs have, in fact, by previous notices to produce, requested production of documents which will reveal employment patterns and practices of Lawyers Cooperative Publishing Company. Plaintiffs still await production of those documents and this court's compelling that production since the defendants have not complied.

14. However, notwithstanding plaintiffs' clear right to examine documents and to compel the production of those documents, plaintiffs are also entitled to defendants written answers, under oath, analyzing, explaining and particularizing the company employment policies, practices, customs and usages.

15. While thus improperly refusing to answer all or a portion of thirty-six out of the sixty-six interrogatories, defendants fail to answer another eleven interrogatories by suggesting that the information ought be available from information they think was previously submitted at the deposition of defendant Donald Bennett which is in progress, pursuant to previous order of this court. (See answers to interrogatories 10, 11, 1 25, 26, 37, 50, 51, 52, 57 and 64.) Such a response to an interrogatory is never a proper response under the Federal Rules. The answer to the interrogatory must be set forth. It is not proper to ask the inquiring party to piece together the answer from what the inquiring party can infer from previous materials submitted in a different context or previous answers to questions in a different context.

16. For the few questions that defendants proffer answers, most of those answers are incomplete. For example, interrogatory 3a requires information from 1960 to present. Defendants supply information only for 1975. Further, in response to interrogatory 3b and for a number of interrogatories thereafter, defendants refer to job descriptions which they attach to their answers. A review of the job descriptions demonstrates that those furnished are not a complete set of the descriptions. Mention is made in the job descriptions submitted of other job descriptions which are not submitted. For example, in the job description of "Collating and Sewing Forelady" reference is made to the

position of "Utility Male" as one of the persons under her supervision. There is no job description for "Utility Male" included in the submitted materials. These classifications and job descriptions which obviously reveal recruiting, classification, transferring, promoting and paying of employees on the basis of sex must be produced.

17. There is no basis for defendants to object to interrogatory 5. Defendants need to have objected to the interrogatory within thirty days of its service - within thirty days of April 3, 1974. So too are the objections defendants now raise to answering interrogatories 48 and 49 untimely.

18. While information is requested from 1960 to date in answer to interrogatory 5, defendants supply information only for the years 1970-74. Information was requested from 1960 to date in answer to interrogatories 10 and 11. None of that information is supplied. Information is requested from 1960 to date in answer to interrogatory 41. Only information for the present is supplied. Information from 1960 to date is requested in answer to interrogatory 60. Again, only information for the present is supplied.

19. The court should grant plaintiffs' motion to compel answers to these interrogatories. Further, the court should impose sanctions on the defendants for their failure to make responsive answers. The court should grant plaintiffs attorneys fees and costs and direct that the defendants be precluded from proof in defense of plaintiffs' claims unless responsive answers are served within thirty days of the court's order.

20. Further, the court should dispose of plaintiffs' pending and previous motions to compel depositions and to produce documents. The only discovery which has proceeded in these cases

has been the discovery which the court has previously ordered in the Loughney case. While defendant Bennett is appearing for testimony pursuant to this court's previous order, plaintiffs are still having difficulty in obtaining production of documents and, in particular, defendants have refused to produce individual personnel records of the plaintiffs themselves for inspection. Every discovery request of the plaintiffs is material and necessary in an employment discrimination case. The time has long since passed when there should be thwarting and/or delay of legitimate discovery.

Emmelyn Logan-Baldwin

November 3, 1975
Rochester, New York

EXHIBIT A

Departments marked with an (R) are exclusively at the Aqueduct Building; those marked with a (W) are exclusively in the Webster Facility. Those not marked are at both facilities.

(b) The information, to the extent known by LCP, may be derived from the job description sheets, submitted herewith. In addition to the jobs described on said sheets, the job categories listed on the sheets entitled "Hourly Ranges and Positions" for January 1, 1969 and January 1, 1970, and "Hourly Grades, Ranges, and Positions", for January 1, 1971, January 1, 1972, and February 1, 1973, submitted herewith, also existed at LCP. The job categories listed on the Hourly sheets were located in the Production Department, unless otherwise noted as:

PC: Production Control Department

EMS: Engineering & Maintenance Services Department

(c) See the job description sheets submitted in response to 3(b), above.

(d) The information, to the extent known to LCP, may be found in the "Salary Grade Sheets" for January 1, 1967 though January 1, 1975, submitted herewith, and the "Hourly sheets" submitted in response to 3(b).

(e) This information may be found in the Salary Grade Sheets for January 1, 1975, submitted in response to Interrogatory 3(d).

(f) The answer to this interrogatory (and the answers hereafter noted) may be ascertained from LCP's business

records in the form of its employee personnel files. The burden of ascertaining this information is substantially the same for plaintiffs as for LCP. Therefore, pursuant to FRCP 33(c), LCP will make its employee personnel files available for plaintiffs' inspection for the time period January 1, 1960 to the present. LCP will make its personnel records available to plaintiffs' attorney under the following conditions:

(1) Copies of, or abstracts from, any personnel file documents may be seen only by plaintiffs' attorney of record, including para-legal, clerical or secretarial employees of plaintiffs' attorney. Copies of, or abstracts from, any personnel file documents may not be seen by the parties-plaintiffs to this action. However, if, for any reason, plaintiffs' attorney believes that any such documents must be seen other than by her or by those of her employees listed above, plaintiffs' attorney must first obtain the written consent of LCP. If such consent is not given, plaintiffs' attorney may apply to the Court for such permission.

In the event that anyone other than plaintiffs' attorney is allowed to see any such copies or abstracts, such person or persons must sign the following oath:

OATH OF CONFIDENTIALITY

(1) I _____, do swear that I shall not disclose any information which I gain from any personnel documents or copies thereof to which I have access by virtue of defendant The Lawyer's Co-operative Publishing Company's answers to interrogatories dated August __, 1975.

(2) I further swear that I have had access to the specified confidential personnel material for the sole purpose of assisting plaintiffs' counsel in trial preparation or trial of this action and such information shall not be used for any business, commercial, competitive or other purpose.

(2) Copies of, or abstracts from, or any information gained by plaintiffs' counsel from employee personnel files is to be used only for purposes of these pending actions. Plaintiffs' counsel is to be specifically responsible for the confidentiality of LCP's employee personnel files and information gained therefrom.

(3) LCP will provide space upon its premises for plaintiff's use for inspection and copying during LCP business hours.

(4) LCP will permit plaintiffs to bring a copying machine upon its premises.

(5) LCP will make available for inspection as many employee personnel files as is practicable at one time. However, since most of the employee personnel files are active files, LCP can make available only a portion of the files at any one time.

(6) The employee personnel files must not leave LCP premises.

(7) Plaintiffs' counsel agrees in writing that she will abide by the foregoing conditions before inspection of said employee personnel files.

(g), (h) and (i). Not Applicable.

4. The answer to this interrogatory may be ascertained from LCP's business records in the form of its employee personnel

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Notice of Motion and Motion to Compel Discovery, and Affirmation is Support of Motion to Compel Discovery on defendants by my causing a copy of same to be delivered to attorneys for defendants, Nixon, Hargrave, Devans & Doyle, John B. McCrory, Esquire, of counsel, Lincoln First Tower, Rochester, New York, this 3rd day of November, 1975.

Emmelyn Logan-Baldwin
Attorney for Plaintiffs
510 Powers Building
Rochester, New York 14614
Tele: 716/232-2292

November 3, 1975
Rochester, New York